SUPREME COURT, U. S.

OCT 9 1973

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No. 73-262

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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ROY M. RAMIREZ AND GEORGE BALLAN, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinions of the court of appeals are reported at 480 F. 2d 76.

### JURISDICTION

The judgment of the court of appeals was entered on May 29, 1973. A petition for rehearing was dknied on July 9, 1973. The petition for a writ of certiorari was filed on August 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether petitioners were entitled to be sentenced under the Comprehensive Drug Abuse Prevention and Control Act of 1970 because they were indicted after the repeal of the prior applicable law.

2. Whether in the circumstances petitioners' sentences constitute cruel and unusual punishment.

3. Whether the trial judge's imposition of a greater sentence upon petitioner Ramirez than upon his co-defendant was the result of ethnic prejudice.

## STATEMENT

After a jury trial in the United States District Court for the Northern District of California petitioners were convicted of conspiracy to import marijuana in violation of 21 U.S.C. (1964 ed.) 176a. Petitioner Ramirez was sentenced to imprisonment for seven years and fined $15,000; petitioner Ballan was sentenced to imprisonment for five years and fined $5,000. The court of appeals affirmed (Pet. App. A; 480 F. 2d 76).

The government's evidence showed that from early 1969 through November 1970, co-defendants Jon Franklin and Frank Sayre headed an organization[1] engaged in smuggling marijuana across the Mexican border by airplane or truck, transferring the contraband to other vehicles in Arizona or southern California, and transporting the marijuana along a circuitous route to San Francisco, California, where it was stored, boxed and distributed. In March 1970, Franklin and Sayre decided to purchase land in Arizona suitable for constructing a private airstrip to lessen the possibilities of detection by customs agents. A ranch near Winslow, Arizona, was purchased and an airstrip on the property was improved. In May 1970, petitioner Ballan, a pilot

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[1] Sixteen others were indicted with petitioners. At the time of trial four were fugitives, two had pleaded guilty to the present charge, four had been dismissed after pleading guilty to a superseding indictment, three were dismissed outright, another was dismissed after testifying as a government witness, and two were tried with petitioners and acquitted by the court.

experienced in clandestine flights to and from Mexico, was brought to the ranch to examine the field and make additional recommendations for improvements (Tr. 92-94, 397-399).[2] Shortly thereafter, Ballan and co-defendant William Shubin flew to Mexico, obtained a plane-load of marijuana, and returned to the Arizona ranch (Tr. 96-100, 108-109). Ballan made additional flights to Mexico for marijuana (Tr. 332-338, 397-400).

Petitioner Ramirez was responsible for arranging for the marijuana to be delivered to prearranged sites in Mexico, where it was picked up by agents of Franklin and Sayre by airplane or truck (Tr. 53, 87-88, 252-253, 400-401). When, in January 1970, one of their pilots returned from Mexico empty-handed, Franklin contacted Ramirez, who reported that the truck driver assigned to deliver the marijuana to the airplane had failed to appear at the appointed date and time because he had been "scared away" (Tr. 376). Two months later that same pilot and other co-conspirators, including Ramirez, met at an airport restaurant in Los Angeles. Ramirez drew two circles on a map, designated them as the landing zones, and indicated that the second one was his own ranch in Mexico (Tr. 383-384). Then, reminded of the prior unsuccessful trip, Ramirez replied, "Don't worry, remember they'll be there this time" (Tr. 383).

Several months later, William Shubin and another individual drove a truck to the Arizona-Mexico border to obtain 1700 kilograms of marijuana. The contraband was loaded onto the truck while it was parked in a river bed. The additional weight of the marijuana caused the truck to sink into the ground. In attempting to

[2] We are lodging with the Clerk of this Court the six-volume transcript of the trial ("Tr.") and sentencing proceedings ("S.").

extricate the truck one of the smugglers broke its drive shaft. When Shubin informed Franklin of this predicament, the latter notified petitioner Ramirez, who then came to the border area with a briefcase containing $10,000. The money was used to purchase two trucks to continue the smuggling operation (Tr. 120-128).

## ARGUMENT

1. At the time petitioners' criminal conduct was committed, the governing statute was 21 U.S.C. (1964 ed.) 176a. Under 26 U.S.C. (1964 ed) 7237(d), then in effect, individuals convicted of violating Section 176a were subject to a mandatory minimum sentence of imprisonment for five years, and were ineligible for probation. The 1970 Comprehensive Drug Abuse Prevention and Control Act, effective May 1, 1971, repealed many criminal statutes relating to narcotics and marijuana, including Sections 176a and 7237. While continuing to proscribe acts such as those committed by petitioners, the new Drug Abuse Act limited the category of offenders subject to a minimum sentence and probation ineligibility.[3] In *Bradley* v. *United States,* 410 U.S. 605, this Court held that an individual charged with violating one of the repealed narcotics statutes was not entitled to the sentencing benefits of the new Drug Abuse Act simply because his conviction and sentencing occurred after May 1, 1971, the effective date of the new legislation.

Recognizing the ruling in *Bradley,* petitioners seek to distinguish it because they were indicted as well as

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[3] A mandatory sentence remains applicable under the Act with respect to persons engaged in a "continuing criminal enterprise." 21 U.S.C. 848(a)(1), (c).

sentenced after the effective date of the Drug Abuse Act of 1970. They point to the savings clause of the new law [Section 1103(a), 84 Stat. 1294], which provides that "[p]rosecutions for any violation of law occurring prior to the effective date of * * * [the Drug Abuse Act] shall not be affected by the repeals or amendments made by [it] * * * or abated by reason thereof," and construe that language to mean that prosecutions beginning before May 1, 1971 are unaffected by the repeal of Sections 176a and 7237, whereas prosecutions commencing after that date are controlled by the sentencing changes found in the new law. As the beginning of their "prosecution," *i.e.*, the return of the indictment, was after May 1, 1971, petitioners claim that the sentencing judge should not have deemed himself bound to impose the mandatory minimum sentence of five years' imprisonment required by Section 7237, and instead should have regarded the five year term as the maximum that could have been imposed under the present law, 21 U.S.C. 841(b)(1)(B).

Contrary to petitioners' contentions, the savings clause was not intended to provide a special advantage for violators of the prior laws who happened to be indicted after May 1, 1971. The savings clause, properly construed, states that prosecutions, no matter when instituted, for violations of laws occurring before May 1, 1971, are unaffected by the repealers. Although in certain instances the new legislation has reduced sentences, there is nothing in the legislative history to indicate a desire to benefit narcotics traffickers whose acts had been committed prior to May 1, 1971, by opening up those violations to the possibilities permitted by the new law for subsequent violations. It is unreasonable to impute to Congress an intention that some violators whose acts occurred while the prior laws were in effect should

gain a windfall simply because criminal proceedings were not instituted against them until after May 1, 1971. Thus, individuals properly charged under the prior laws are to be sentenced under the prior laws, no matter when their indictment is returned. *United States* v. *Cummings*, 468 F. 2d 274 (C.A. 9); *United States* v. *Van Poyck*, 464 F. 2d 575 (C.A. 5). Indeed, in *Bradley*, the Court said (410 U.S. at 611): "The mandatory minimum sentence of five years must therefore be imposed on offenders who violated the law before May 1, 1971." To the extent that petitioners rely on *United States* v. *Stephens*, 449 F. 2d 103 (C.A. 9), for their argument (Pet. 23), we note that *Stephens* was expressly overruled by this Court in *Bradley, supra*, 410 U.S. at 607.

In any event, even if the provision of prior law concerning mandatory sentences was not carried forward by the express terms of the savings clause in the Drug Abuse Act with respect to offenses committed prior to repeal, it would have been preserved by the general saving statute, 1 U.S.C. 109, which provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability. * * *

Section 109 must be read into every repealing statute, unless it contains an express provision to the contrary, and the terms "liability" and "penalty" include provisions concerning punishment. *United States* v. *Reisinger*, 128 U.S. 398; *United States* v. *Brown*, 429 F. 2d 566 (C.A. 5); *United States* v. *Smith*, 433 F. 2d 341 (C.A. 4),

certiorari denied, 401 U.S. 942. This is true even when the repealing act contains its own specific saving provision, as long as the repealing act does not provide otherwise. See *Duffel* v. *United States,* 221 F. 2d 523, 524 (C.A. D.C.); *United States* v. *Kirby,* 176 F. 2d 101, 104 (C.A. 2); *Lovely* v. *United States,* 175 F. 2d 312, 316 (C.A. 4). The repealing act in this instance does not attempt to bar the application of the general saving statute.

2. The enactment of the Drug Abuse Act did not automatically cause sentences meted out under the prior existing law to become cruel and unusual or excessive. See *United States* v. *Rojas-Colombo,* 462 F. 2d 1091 (C.A. 5). This is particularly true with respect to the sentences of imprisonment for five and seven years imposed upon petitioners, after they were found to have been involved in a massive marijuana smuggling operation. Unlike the death penalty, see *Furman* v. *Georgia,* 408 U.S. 238, relied upon by petitioners (Pet. 19-20), there is no indication that the sentences authorized by prior drug statutes are now deemed unduly severe or have been unequally applied. Nor is there any reason at this time to question the wisdom of Congress in continuing to prohibit the importation of marijuana and providing substantial penalties for violators of the importation proscriptions.[4] *Rener* v. *Beto,* 447 F. 2d 20 (C.A. 5).

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[4] We note that the prison term imposed upon petitioner Ballan (five years) was within the permissible range of punishment under the new Drug Abuse Act. The seven year sentence received by petitioner Ramirez was less than he would have received if prosecuted as a supervisor of a continuing criminal enterprise under 21 U.S.C. 848, now in effect. That statute carries a mandatory minimum term of imprisonment for ten years.

3. Finally, petitioner Ramirez asserts that his sentence to imprisonment for seven years was greater than that of his co-defendant because the sentencing judge was biased against individuals of Mexican descent. Nothing in the extensive record of trial supports any claim of ethnic prejudice. Instead, Ramirez refers solely to a post-trial comment made by the judge when imposing a higher bail on Ramirez pending appeal ($35,000) than upon petitioner Ballan ($25,000), that the difference in the amounts was based upon evidence of Ramirez' connections in Mexico and the court's experience that defendants who have Mexican contacts too often seek haven there after conviction (S. 7).

In pursuing this claim Ramirez has completely ignored the evidence at trial which demonstrated that he was more heavily involved in the extensive smuggling ring than was his co-defendant, and that he was in fact the so-called Mexican connection for the marijuana imported by the Franklin-Sayre operation (Tr. 401). Moreover, during the trial the court rejected the prosecutor's motion to increase bail or remand Ramirez at that time on the ground that it appeared from the conduct of Ramirez' counsel that Ramirez might not remain until the end of the trial (Tr. 496). The motion was overruled as soon as it was made, without even waiting for a response from counsel for Ramirez (Tr. 496-497). That ruling hardly supports an allegation of bias. In light of this, coupled with the fact that Ramirez' sentence is still less than half the maximum which might have been imposed (twenty years' imprisonment), the claim of prejudice by the trial judge is without merit.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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